



TRIAL OF AMBROSE LEPINE

AT

WINNIPEG

for the wilful murder

OF

THOMAS SCOTT.

QUESTION OF JURISDICTION.

BY

THOMAS P. FORAN,

OF THE

BAR OF MONTREAL.

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ALTHOUGH Lepine has been found guilty of the wilful murder of Thomas Scott at Fort Garry, and the sentence of death has been pronounced by the Honorable Judge who presided at the trial, it may not be improper to call attention to a question which seems to have been lost sight of by all parties. Had the Court held by Chief-Justice Wood jurisdiction to hear, try and determine the accusation against Lepine? is the first question which naturally presents itself to the legal mind, and yet a decision upon this point was not demanded by the Counsel for the defence in the recent trials in Manitoba.

On the 2nd May, 1670, Charles II of England granted by Charter to "The Governor and Company of Adventurers of England trading into Hudson's Bay:

"The sole trade and commerce of all those seas, straits, bays, rivers, lakes, creeks and sounds, in whatsoever latitude they shall be, that lie within the entrance of the straits commonly called Hudson's Straits, together with all the lands and territories upon the countries, coasts and confines of the seas, bays, rivers, lakes, creeks, sounds aforesaid, that are not already actually possessed by or granted to any of our subjects, or possessed by the subjects of any other Christian Prince or State."

And it was declared in the Charter that "The Governor and Company shall have liberty, full power and authority to appoint and establish Governors and all other officers to govern them, and that the Governor and his Council of the several and respective places where the said Company shall have plantations, forts, factories, colonies or places of trade within any the countries, lands or territories hereby granted, may have power to judge all persons belonging to the said Governor and Company or that shall live under them, in all causes whether civil or criminal, according to the laws of this kingdom, and to execute justice accordingly; and in case any crime or misdemeanor shall be committed in any of the said Company's plantations, forts, factories or places of trade within the limits aforesaid, where judicature cannot be executed for want of a Governor and Council there, then in such case it shall and may be lawful for the Chief Factor of that place and his Council to transmit the party, together with the offence, to such other plantation, factory, or fort where there shall be a Governor and Council, where justice may be executed, or into this kingdom of England, as shall be thought most convenient, there to receive such punishment as the nature of his offence shall deserve."

It has been contended by some that this last clause of the Charter empowered the Governor and Company to try all offenders, whether in the employ of the Company or not, who were accused of having committed any crime within the limits of their territory, even where the punishment of such crime was death.

The fallacy of this statement is seen at a glance. How could Charles II, *suo motu* delegate to others the right and authority of making laws to punish crimes, when he had not himself the power of legislating without the advice and assistance of Parliament? It was the King, and not the King, Lords and Commons, who granted the Charter to Prince Rupert and his associates.

In order to discover, therefore, by what criminal laws the people within the limits of the Hudson's Bay Territory were governed from 1670 down to 1803, when the first Statute was passed by the Imperial Parliament for the trial of offences committed there, recourse must be had to the Statute Law of England. In the 33d year of King Henry VIII'S reign, an Act was passed "to proceed by Commission of Oyer and Terminer against such persons as shall confess treason, etc., without remanding the same to be tried in the shire where the offence was committed." (33 Henry VIII, ch. 23.)

By this Act it was provided :

"That if any person or persons being examined before the King's Council, or three of them, upon any manner of treasons, misprisions of treasons or murders, do confess any such offence, or that the said Council or three of them upon such examination shall think any person so examined to be vehemently suspected of any treason, misprisions of treasons or murders, that then in every such case, by the King's commandment, His Majesty's commission of Oyer and Terminer under his Highness' Great Seal shall be made by the Chancellor of England to such persons, and into such shires or places as shall be named and appointed by the King's Highness for the speedy trial, conviction or delivery of such offenders, which commissioners shall have power and authority to enquire, hear and determine all such treasons, misprisions of treasons and murders within the shires and places limited by their commission, by such good and lawful persons as shall be returned before them by the Sheriff or his minister or any other having power to return writs and process for that purpose in whatsoever other shire or place within the King's Dominions, or *without*, such offences of treasons, misprisions of treasons or murders so examined were done or committed ; and that in such cases no challenge for the shire or hundred shall be allowed."

This Statute and not the By-Laws of the Company regulated the punishment of the more grievous offences within the limits of the Territories, until in 1803, when the Statute

intituled: "An Act for extending the jurisdiction of
 " the Courts of Justice in the provinces of Lower and
 " Upper Canada to the trial and punishment of persons
 " guilty of crimes and offences within certain parts of
 " North America adjoining to the said Provinces," (43
 George 3rd, chapter 138,) was passed by the Imperial
 Parliament. The following are some of its provisions :

" Whereas crimes and offences have been committed in
 " the Indian Territories and other parts of America not
 " within the limits of the Provinces of Lower and Upper
 " Canada or either of them, or of the jurisdiction of any
 " of the Courts established in those Provinces, or within the
 " limits of any civil government of the United States of
 " America, *and are therefore not cognizable by any jurisdiction*
 " *whatever*, and by reason thereof, great crimes and offences
 " have gone and may hereafter go unpunished, and greatly
 " increase,.....be it enacted..... That from, and after
 " the passing of this Act, all offences committed within any
 " of the Indian Territories or parts of America not within
 " the limits of either of the said Provinces of Lower or Upper
 " Canada, or of any civil government of the United States of
 " America, shall be and be hereby deemed to be offences of
 " the same nature, and shall be tried in the same manner and
 " subject to the same punishments as if the same had been
 " committed within the Provinces of Lower or Upper Can-
 " ada.

" That it shall be lawful for the Governor or Lieutenant
 " Governor, or person administering the Government for the
 " time being of the Province of Lower Canada, by commis-
 " sion under his hand and seal, to authorize and empower any
 " person or persons wheresoever resident or being at the
 " ~~time to act as Civil Magistrates and Justices of the Peace~~
 " for any of the Indian Territories or parts of America not
 " within the limits of either of the said Provinces,
 " or of any civil government of the United States of
 " America, as well as within the limits of either of the
 " said Provinces, either upon information taken or given

" within the said Provinces of Lower or Upper Canada, or
 " out of the said Provinces in any part of the Indian Terri-
 " tories or parts of America aforesaid, for the purpose only
 " of hearing crimes and offences, and committing any person
 " or persons guilty of any crime or offence to safe custody in
 " order to his or their being conveyed to the said Province
 " of Lower Canada to be dealt with according to law; and
 " it shall be lawful for any person or persons whatever to
 " apprehend and take before any person so commissioned as
 " aforesaid, or to apprehend and convey, or cause to be safe-
 " ly conveyed with all convenient speed to the Province of
 " Lower Canada, any person or persons guilty of any crime
 " or offence, there to be delivered into safe custody for the
 " purpose of being dealt with according to law.

" That every such offender may and shall be prosecuted
 " and tried in the Courts of the Province of Lower Canada
 " (or if the Governor or Lieutenant Governor, or person ad-
 " ministering the Government for the time being shall, from
 " any of the circumstances of the crime or offence, or the local
 " situation of any of the witnesses for the prosecution or
 " defence think that justice may more conveniently be admin-
 " istered in relation to such crime or offence in the Pro-
 " vince of Upper Canada, and shall by any instrument un-
 " der the great seal of the Province of Lower Canada declare
 " the same, then that every such offence may and shall be
 " prosecuted and tried in the Court of the Province of Upper
 " Canada), in which crimes or offences of like nature are
 " usually tried, and where the same would have been tried if
 " such crime or offence had been committed within the
 " limits of the Province where the same shall be tried under
 " this Act."

It is evident from the wording of this Act that the British
 Parliament considered that the Governor and Company had
 no authority to try offences, and that crimes committed out-
 side of Lower and Upper Canada, and of the United States,
 but in North America, had not been cognizable by any juris-
 diction whatever till the passing of this Statute.

It was in virtue of this Act that Charles de Reinhard was brought from the Red River district to Quebec, in May, 1818, to undergo his trial for a murder committed on the Winnipeg River, two years previously.

In October, 1818, several trials for murder were held at York (Toronto) under a commission issued in virtue of this statute by the Lieutenant Governor of Lower Canada. In these cases, the accused had been apprehended in the North West Territories and conveyed to Upper Canada.

In the same year Lord Selkirk caused several parties to be tried at York (Toronto) for murder, arson, and robbery committed on the Frog Plains, Red River district. The trials were held under the Statute which I have just quoted, under a commission from Lower Canada.

In Reinhard's case, and in the cases brought by Lord Selkirk, the jurisdiction of the Courts was attacked on the ground that the Frog Plains and Winnipeg River were within the limits of the Province of Upper Canada, and not included in the Territories mentioned in the Statute 43, George III, chapter 138.

The Court at York refused to render any decision upon the question of jurisdiction, while the Judges at Quebec held that, as the westerly boundary of Upper Canada was a line on the meridian of 88° 50' West from London, the River Winnipeg was beyond the limits of that Province.

But doubts were entertained by some whether the provisions of the Act 43 George III, ch. 138, extended to the territories granted by Charles II to the Hudson's Bay Company; and as murders and riots were increasing to an alarming extent, owing to the rivalry of the North West Company of Montreal and the Hudson's Bay Company proper, a Statute was passed in 1821 by the Imperial Parliament (1-2 George IV, chapter 66) from which the following extracts are taken :

"Whereas doubts have been entertained whether the provisions of an Act passed in the 43rd year of the reign of his late Majesty King George the 3rd, (ch. 138), extended

“ to the Territories granted by Charter to the said Governor
 “ and Company (of the Hudson's Bay,) and it is expedient
 “ that such doubts should be removed and that the said Act
 “ should be further extended,.....

V. “ *The said Act, (43 Geo. 3, ch. 138) and all the clauses and
 “ provisoes therein contained shall be deemed and construed, and it
 “ is and are hereby respectively declared to extend to and over and
 “ to be in full force in and through all the Territories heretofore
 “ granted to the Company of Adventurers of England trading to
 “ Hudson's Bay, any thing in any Act of Parliament, or in any
 “ grant or charter to the Company, to the contrary notwithstanding.*”

XI. “ His Majesty may issue commissions under the Great Seal empowering Justices to hold Courts of Record for trial of criminal or civil offences,

XII. “ *Provided always that such Courts shall be constituted as to the number of Justices.....but shall not try any offender upon any charge or indictment for any felony made the subject of capital punishment, or for any offence, or passing sentence affecting the life of any offender, or adjudge or cause any offender to suffer capital punishment or transportation and in every case of any offence subjecting the person committing the same to capital punishment or transportation, the Court or any Judge of any such Court, or any Justice or Justices of the Peace before whom any such offender shall be brought, shall commit such offender to safe custody, and cause such offender to be sent in such custody for trial in the Province of Upper Canada.*”

These therefore were the laws which obtained throughout the whole of the North West Territories in 1821, and their force is not lessened by the fact that the officers of the Hudson's Bay Company continued to try murderers, etc., under the authority of the clause in their charter which I have quoted above.

Mr. Thorn while acting as Recorder of Red River (about 1847) sentenced an Indian to death for having killed a Sioux. The sentence was carried into execution.

Lieutenant-Colonel Caldwell, Governor of Assiniboia, sentenced a squaw to death for infanticide, in 1854, but the sentence was commuted to imprisonment during two years.

The Statute 12-13 *Victoria*, chapter 48, repealed parts of the Statutes 43 *George 3*, chapter 138, and 1-2 *George IV*, chapter 66, as to Vancouver's Islands.

The Act 21-22 *Victoria*, chapter 99, s. 4, repeals parts of the Statutes 43 *George 3*, ch. 138, and 1-2 *George IV*, ch. 66, as to British Columbia.

By an Act passed in 1859 (22-23 *Victoria*, chapter 26) it was provided that :

"It shall be lawful for Her Majesty by the commission
 "by which any Justices of the Peace are appointed under
 "the said Act of King George 4, (ch. 66,) or by any subsequent commission, or by any order in Council from time to
 "time, to authorize any such Justice or Justices to take cognizance of and try in a summary way all crimes, etc., within
 "the local limits of the jurisdiction of such Justices.....
 "*Provided always that where the offence with which any person*
"is charged before any such Justice or Justices is one which is
"punishable with death or one which in the opinion of such Justice or Justices ought, either on account of the inadequacy of
"the punishment which said Justice or Justices can inflict, or for
"any other reason, to be made the subject of prosecution in the
"ordinary way rather than to be disposed of summarily, such
"Justice or Justices shall commit the offender to safe custody, and
"cause him to be sent in such custody for trial to Upper Canada
"as provided by the said Act of King George 4, (ch. 66,) or, where
"such Justice or Justices may see fit, to the colony of British
"Columbia, and such offender may be tried and dealt with by
"any Court constituted in British Columbia having cognizance
"of the like offences committed there."

Sections II and IV provide that nothing herein contained shall extend to the territories granted to the Company of Adventurers trading to Hudson's Bay, or affect the power to establish Courts of Record in accordance with 1-2 *George IV*, ch. 66.

It appears from these two Statutes (1-2 George IV, ch. 66, and 22-23 Victoria, ch. 26,) that the courts to be established in the Indian Territories were not to have jurisdiction over offences punishable by death or transportation; and as these Acts contain the only authority to erect courts in those territories, it is clear that the Recorder's and other Courts established at Winnipeg and elsewhere since 1859, were not competent to try Lepine for the wilful murder of Scott.

It now becomes necessary to enquire whether this last Statute, 22-23 Victoria, ch. 26, applied to the Red River settlement and to Winnipeg, and for that purpose it is requisite to determine whether the "Territories granted to the Company of Adventurers trading to Hudson's Bay," included the place where Scott was killed.

The charter to Prince Rupert and his associates was granted by Charles II of England on the 2nd May, 1670, and it was to include, as we have already seen, the sole trade and commerce of those seas, bays, etc., with all the lands upon the confines thereof "that are not already possessed by the subjects of any other Christian Prince or State."

But Louis XIII of France had, forty-three years previously (29th April, 1617,) granted to the Company of Cent Associés :

"Le fort et habitation de Québec avec tout le pays de la Nouvelle France tant le long des côtes depuis la Floride, en rangeant les côtes de la mer jusqu'au cercle arctique pour latitude, et de longitude depuis l'isle de Terre-Neuve tirant à l'ouest au grand lac dit la mer douce et au delà, que dedans les terres, et le long des rivières qui y passent et se déchargent dans le fleuve appelé St. Laurent, ou autrement, la grande rivière du Canada et dans tous les autres fleuves qui se portent à la mer."

The Company of Cent Associés surrendered this Territory to the Crown of France in 1663, and the surrender was accepted by Louis XIV.

Verrazani in 1524 (146 years before the granting of the Charter to Prince Rupert, and 100 years before Hudson's voyage,) visited the Hudson's Bay and North West Terri-

tory, and by command of his King, Francis I of France, called it Nouvelle France. In 1629, the Beaver Company began trading in the neighborhood of Fort Garry.

Jean Bourdin, a subject of France, was the first to visit the Hudson's Bay for purposes of trade (1656.)

In 1663 the French Governor of Canada D'Avaugour at the request, of several Indian deputations, despatched a missionary to the North West Territories.

When the English adventures landed in 1670, they were obliged to employ two French guides, Desgrozeliers and Radisson, who had previously visited the country as employees of the Cent Associés Company.

In 1814 Lord Brougham gave it as his opinion that the Red River District transferred to Lord Selkirk in 1811 by the Hudson's Bay Company had never belonged to the latter, and was not included in the lands granted by its charter.

The fact cannot be disputed that the place where Scott was killed had been already possessed by the subjects of the King of France long prior to 1670, and it cannot be denied that no Hudson's Bay traders were established in the Indian country about Lake Winnipeg or the Red River until after the cession of Canada in 1763 to the British, and after the formation among others of the North West Company of Montreal.

The right of the French Crown to the territory in question was recognized by the Treaty of Saint Germain-en-Laye (A. D. 1631, thirty-eight years before the Prince Rupert Charter,) between France and England.

France continued to hold the territory under the Treaty of Ryswick, A. D. 1697; but the 10th article of the Treaty of Utrecht in 1713, provided that the King of France should without exception restore to the kingdom and Queen of Great Britain "the bay and straits of Hudson together with all lands, seas, sea-coasts, rivers, and places situate in the said bay and straits and which belong thereunto, no tracts of lands or of sea being excepted, which are at present possessed by the French subjects of France."

The Red River District is most certainly not included in the above, and it remained in the possession of the French until the Treaty of Paris (10th January, 1763), when it was ceded with the rest of their territory to the British.

But even were it included in the lands described in the 10th article of the Treaty of Utrecht, how can the Hudson's Bay Company claim it under a charter dating back forty-three years before the Treaty?

In 1780, the Montreal, the North West and other Lower Canadian companies began to visit and to establish posts in the neighborhood of the Winnipeg River, and they continued to trade with the Indians throughout the Arthabaska and Red River Districts till 1821, when they combined with the Hudson's Bay Company proper.

On the 15th December, 1821, a license was granted to the North West Company of Montreal and to the Hudson's Bay Company, by which the exclusive right of trading in the Red River District was secured to them for twenty-one years; but the Companies bound themselves, under a penalty of £5000, to deliver up all criminal offenders for trial. If the Red River district was granted by the original Charter, this licence was utterly superfluous.

This license was renewed in 1838 by a Crown grant of the exclusive trade with the Indians in certain parts of North America for a term of twenty-one years.

This Crown grant recited the purchase by the Hudson's Bay Company proper of the rights and interests of the North West Company of Montreal, and contained also a stipulation whereby the Company should give security in the penal sum of £5000 to produce and deliver all criminal offenders for trial before the proper courts.

The authorities seem to have considered the claim of the North West Company to the Red River District as valid as that of the Hudson's Bay Company. This may be inferred from the instructions given by Sir Gordon Drummond to the escort which he furnished Lord Selkirk in 1816.

I think there can be no doubt, that the "territories granted to the Company of Adventures of the Hudson's Bay" did not include the Red River District, but that the latter was in the possession of France till 1763, and that the right to trade within the limits was never exercised and owned by the Hudson's Bay Company until 1821, after its amalgamation with the Montreal Company, and after the License accorded to them in that year.

But if this Statute 22-23 Victoria, ch. 26, did not apply to Red River District, it is obvious that then the Acts 1-2 George IV, ch. 66, and 43 George III, ch. 138, which had never been repealed, would remain in full force and effect, and that criminals accused of capital offences in the territories belonging to the Hudson's Bay Company should be sent for trial to Upper Canada.

The Statute 43 George III, ch. 138, remained in force till 1872, when it was repealed by the Statute Law Revision Act, (ch. 63), and the Act 1-2 George IV, ch. 66, was repealed only in 1873, (ch. 91).

Prior to the passing of the 22-23 Victoria, ch. 26, it is evident that no Court but that of Upper Canada had jurisdiction over capital offences committed in any part of the North West and Hudson's Bay Territories except Vancouver's Island and British Columbia. No courts had been established before the passing of that Act, as appears by the preamble of the Statute.

After this Statute came into force the Courts of British Columbia had concurrent jurisdiction with those of Upper Canada.

The Statute 31-32 Victoria, ch. 105, provided that :

"It shall be competent to Her Majesty by any such order or orders in Council as aforesaid, on address from the Houses of Parliament of Canada, to declare that Rupert's Land shall, from a date to be therein mentioned, be admitted into and become part of the Dominion of Canada, and therefore it shall be lawful for the Parliament of Canada from the date aforesaid to make, ordain and establish within the land and territories so admitted as aforesaid, all such laws, institutions and

ordinances, and to constitute such Courts and officers as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein. Provided that until otherwise enacted by the said Parliament of Canada, all the powers, authorities and jurisdiction of the several Courts of Justice now established in Rupert's Land, and of the several officers thereof, and of all magistrates and justices now acting within the said limits, shall continue in full force and effect therein."

The order in Council mentioned in the preceding Statute was not passed until the 23rd June, 1870, and the 15th July, 1870, was the date fixed for the admission of the North West Territories into the Dominion of Canada.

Scott had been killed on the fourth of March, 1870, before the passing of the order in Council, and therefore any laws which the Dominion Parliament may have made for the good government of the North West Territories or Manitoba had neither force nor effect in that District at the time of his death.

The law governing capital offences in the Red River District at the time of Scott's death, and until the 15th July, 1870, was the Statutes 1-2 Geo. IV, ch. 66, and 22-23 Victoria, chapter 26, quoted above, which authorized the erection of Courts in the district, but which prohibited such Courts from hearing or determining any accusation entailing the death penalty, and ordered the local Courts and authorities to send the offenders to Upper Canada or to British Columbia for trial.

Objection may be made on the ground that the Province of Upper Canada has ceased to exist since the Act to reunite the Provinces of Upper and Lower Canada, (3-4 Victoria, ch. 35,) and more especially since the Union Act of 1867, (30-31 Victoria, ch. 3); but a reference to the 45th and 47th sections of the first mentioned Act, and to the 6th, 12th and 63rd sections of the Act of 1867, will be sufficient to show that the Courts of the Province of Ontario fully replace those of the late Province of Upper Canada.

Montreal, 1st December, 1874.